SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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Re: ***Reserves Development LLC v. Crystal Properties, LLC***
C.A. No. 05C-11-011-RFS

On Plaintiff Reserves Development LLC's Motion
for Partial Summary Judgment. Denied.

Submitted: October 18, 2006
Decided: January 24, 2007

Dear Counsel:

This is my decision regarding Plaintiff, Reserves Development LLC's (hereinafter "Reserves") Motion for Partial Summary Judgment. For the reasons set forth herein, the Motion is denied.

BACKGROUND

On March 24, 2004, Reserves entered into a Purchase and Sale Agreement (hereinafter "Sales Contract") with Crystal Properties LLC (hereinafter "Crystal"). Under the Sales Contract, Crystal purchased 30 unimproved lots in a 185 lot development. The development project is named

"Reserves Resort, Spa and Country Club," and is located in Ocean View, Delaware. The purchase price listed in the Sales Contract was $2,250,000. The Sales Contract provided that $1,500,000 would be escrowed. The escrow was "to protect Seller [Reserves] against Purchaser's [Crystal's] failure to achieve and pay for installation of the Infrastructure . . . Purchaser shall at Settlement deposit the sum of $1,500,000 into an interest bearing escrow account with Purchaser's legal counsel, for application towards Purchaser's obligations to pay for its share of the Infrastructure . . ." Ex. B. of Compl. at 2, para. 3(c). Inexplicably, the account was not opened as required. Instead, the escrow account was opened by Reserves' lawyer.

With Reserves' consent, the Sales Contract was assigned to Bella Via, LLC (hereinafter "Bella Via"). On October 6, 2004 Bella Via went to settlement and now holds legal title to the land. Thereinafter, the parties sought to engage a site contractor for the installation of the infrastructure and development of the whole property. Reserves Development Corporation, affiliated with Reserves, employed Obrecht-Phoenix Contractors, Inc. (hereinafter "Obrecht-Phoenix") to be the contractor manager. The affiliate also signed two contracts with Fresh Cut Custom Design Landscaping Inc. (hereinafter "Fresh Cut") for site work. Initially, it proposed one contract in the 7-8 million dollar range for the whole development. Bella Via was to be a party to that contract but did not want responsibility beyond its phase of the project. Thereinafter, a $3,015,000 site contract was prepared to address this concern. However, Bella Via was not a party to the contract. It pertained to construction of improvements for the 30 lots owned by Bella Via as well as for 41 lots retained by Reserves. The second agreement provided for the completion of a clubhouse, tennis courts, amenities, and improvements elsewhere at the resort.

Bills were submitted to Bella Via for payment of its share of the infrastructure cost as

approved by Obrecht-Phoenix. Reserves contends that Fresh Cut billed $2,286,410.82 for work that involved 71 lots. Reserves claims that Crystal and Bella Via (collectively referred to as "Defendants") owe a percentage of this bill based on a proration of the respective lots owned by the parties (30/71 or 42.25% for Bella Via; 41/71 or 57.75% for Reserves). The amount allegedly due is $966,008.56.

Later, Fresh Cut filed for bankruptcy. Before that occurred, however, Reserves entered an Assumption and Release of Obligations Agreement (hereinafter "Release") with Christopher Glenn (hereinafter "Glenn"). The document said Glenn was the President and sole stockholder of Fresh Cut. Later, it was learned that Glenn was only a 50% shareholder. Nevertheless, Glenn assumed all of Reserves' obligations to pay Fresh Cut for the site work. Glenn caused Fresh Cut to agree to hold him solely responsible and not to look to Reserves.

Along with the Release, Glenn and Reserves signed a companion agreement. Under the agreement, lots individually valued at $250,000 were placed in escrow. They were to be released in $250,000 increments based upon Glenn's payment of Fresh Cuts' billings in these amounts. Eventually, eight lots were deeded to Glenn, purporting to be worth 2 million dollars. However, Glenn did not pay Fresh Cut for its work.

In a subsequent Chancery Court action, Reserves sought to rescind these conveyances and others that were escrowed. Approximately $635,000 in mechanic's liens and other demands allegedly were caused by Fresh Cut's defaults. Further, Reserves alleged that it paid Fresh Cut $750,000 in cash for the site work. Am. Compl., para. 8, 10.

In seeking to lift the bankruptcy stay, Reserves alleged that Fresh Cut "persistently and repeatedly" refused to employ enough skilled workers to perform the site contract, failed to fully pay

subcontractors and suppliers, and had "persistently refused to complete certain portions of its work as required by public authorities having jurisdiction despite being directed by the construction manager to do so." Mot. of the Reserves Development Corporation for Relief from Stay at 4, para. 16, 17, 18.

STANDARD OF REVIEW

Summary judgment cannot be granted where material issues of fact exist; only a jury can resolve them. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). The moving party must establish the lack of material factual issues. *Id.* Should the moving party establish the absence of material factual issues, the nonmoving party must prove the presence of such issues in order to prevent summary judgment. *Id.* at 680. Where the moving party has produced sufficient evidence under Superior Court Civil Rule 56, the non-moving party may not rely solely upon her pleadings. *Id.* Evidence must be produced showing a material issue of fact. *Steffen v. Colt Industries,* 1987 WL 8689, at *3 (Del. Super. Feb. 4, 1987) (citing *Celotex Corp. V. Catrett*, 477 U.S. 317, 322-23 (1986)). Summary judgment is not appropriate if the Court determines that it does not have sufficient facts to enable it to apply the law. *Reese v. Wheeler*, 2003 WL 22787629, at *2 (Del. Super. Nov. 4, 2003) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

DECISION

After review of the arguments and the present state of the record, partial summary judgment cannot be entered. The affidavit of Obrecht-Phoenix's employee (hereinafter "Affidavit") submitted by Reserves to support the motion is conclusory. It states the amount billed by Fresh Cut was $2,286,410.82. However, the work allegedly attributed for Bella Via's share is not detailed. There is an application for payment form attached to the complaint which describes work done, and

reported the total value to be $1,031,294.60 at an earlier time. However, it does not delineate Bella Via's pro-rata share, nor is there a similar application to support the $2,286,410.82 number. Without a more thorough foundation, the Court does not have a reliable basis to enter a judgment focused on Bella Via's shared responsibility with Reserves.

Under the Sales Contract, the parties anticipated that "a mutually agreeable" contract would be executed to install the infrastructure. Defendants would then be responsible to pay a proportionate share. Ex. B. of Compl. at 4, para. 4(B)(5). If Bella Via were to build the infrastructure, the contract(s) had to be "reasonably acceptable." *Id*. at 2, para. 3(c); at 5, para. 4(B)(5)(iii).

Bella Via suggests Reserves operated in a heavy handed fashion. Bella Via was not permitted to sign the Fresh Cut site contract for its part of the development. It claims its displeasure was expressed verbally to Obrecht-Phoenix. There was an email on this subject which questioned the exclusion and wondered "why the game had changed." Beforehand, Bella Via attempted to employ another site contractor, Knorr Contracting, Inc., (hereinafter "Knorr"). Reserves rejected Knorr's bid in favor of Fresh Cut and apparently determined Knorr was not "reasonably acceptable." Can it be said that Fresh Cut's employment was mutually acceptable? Did Bella Via's conduct amount to an objection and, if so, was it waived? Presently, there is some ambiguity which can only be removed at trial. Obviously, Bella Via's payment obligations may be affected.

Furthermore, there is a dispute whether the $3,015,000 contract included $400,000 worth of work which was the exclusive responsibility of Reserves. There were meetings where work of this nature was estimated to be about $438,000. Deposition and documentary evidence may support the inference that $400,000 was a compromise figure. Reserves refused to address this point in writing

despite requests from Bella Via to clarify its financial responsibilities. Therefore, a question arises whether Bella Via was responsible for a percentage of $3,015,000 or $2,615,000. Also, in this regard, the record is silent as to whether the 5% retainage of gross billings due Fresh Cut was part of the billings charged to Bella Via or required to be paid by Bella Via periodically. The application for payment referenced before shows the retainage was held back by Reserves. Normally, retainage is not paid until there is acceptance of site work after substantial completion.

Moreover, under the Sales Contract, payment may be required only for work that was properly done by Fresh Cut and paid for by Reserves. The cash payments appear to be $750,000 not the figure of $2,286.410.82 stated in the Affidavit. Whether or not the lot conveyances would add 2 million dollars to the calculation cannot now be decided. While the $2,286,410.82 billing approximates 88% of the work was complete, Knorr estimates a lower figure between 40% and 50%.

As previously indicated, Reserves alleges that Fresh Cut was deficient in various ways. If Reserves is excused from its obligation to pay Fresh Cut, then, perhaps, Bella Via should be released as well. As aspects of Fresh Cut's work is disputed, the amount due is factually driven. The parties recognize the covenant of good faith and fair dealing as part of their Sales Contract. *See Marshall v. Priceline.com, Inc.,* 2006 WL 3175318 (Del. Super. Oct. 31, 2006) (finding that the covenant of good faith and fair dealing is part of every contract and inflated charges may violate it). Would the parties expect Bella Via to be in a different position than Reserves if Fresh Cut was deficient in its work concerning the 71 lots? The record fairly raises the question whether Fresh Cut over-billed Reserves and did not properly perform its work, and makes Reserves' $2,286,410.82 figure uncertain.

CONCLUSION

In this case, Reserves seeks the total of $1,597,087.91 plus consequential and punitive damages. Further, it requests a declaratory judgment on Bella Via's future pro-rata responsibilities. The facts on these claims are interwoven, and a trial will be necessary to settle them. In this context, a decision should be made with the benefit of *viva voce* and documentary evidence admitted in court. What has been presented is the tip of the proverbial iceberg, and the entry of a final judgment will depend significantly on the credibility of the parties and trial evidence.

Considering the foregoing, Reserves' Motion for Partial Summary Judgment must be denied as there are material issues of fact and law in dispute which require a fully developed trial record to resolve.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary